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In The

Supreme Court of the United States

October Term, 1997

DOVE VALLEY BUSINESS PARK ASSOCIATES, LTD., a Colorado Ltd. Partnership; HAVANA STREET, LTD., a Colorado limited partnership and GULLWING ACRES LIMITED LIABILITY CO., a Wyoming limited liability company; and COLORADO NATIONAL BANK, a federally chartered bank, as successor by merger to BANK WESTERN, a federal savings bank,

Petitioners,

v.

THE BOARD OF COUNTY COMMISSIONERS OF ARAPAHOE COUNTY, COLORADO; and ADRIAN B. "BERNIE" CIAZZA, TREASURER, ARAPAHOE COUNTY, COLORADO,

Respondents.

On Petition For Writ Of Certiorari To The Colorado Supreme Court

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Does Colorado's statutory scheme mandating that delinquent taxpayers pay a penalty on property tax assessments determined to have been erroneously levied violate the Due Process and Taking Clauses of the United States Constitution, and conflict with applicable, but older, decisions of the United States Supreme Court holding a penalty on erroneously assessed taxes to be unconstitutional?

PARTIES TO THE PROCEEDINGS BELOW

The parties to the proceedings below are those set forth in the caption to this petition, with one exception. Dove Valley Business Park Associates, Ltd., a Colorado Ltd. Partnership; Havana Street, Ltd., a Colorado limited partnership and Gullwing Acres Limited Liability Co., a Wyoming limited liability company; and Colorado National Bank, a federally chartered bank, as successor by merger to Bank Western, a federal savings bank, are petitioners hereto. The Board of County Commissioners of Arapahoe County, Colorado, and Adrian B. "Bernie" Ciazza, Treasurer, Arapahoe County, Colorado are respondents hereto. In the proceedings below, Abacus Group Realty Holding Company II, a Delaware corporation, as successor by merger to Diversified Land Holdings, Inc., a Delaware corporation, was also a party but has not joined the other petitioners in seeking review by this Court.

RULE 29.6 LISTING

The only corporate filer may be Colorado National Bank, which is really a federally chartered bank. Its parent company is First Bank National Association and, by merger, U.S. Bank National Association, a federally chartered banking association, which itself is a subsidiary of U.S. Bancorp., a federally registered bank holding company.

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PETITION FOR WRIT OF CERTIORARI

Dove Valley Business Park Associates, Ltd., a Colorado limited partnership; Havana Street, Ltd., a Colorado limited partnership and Gullwing Acres Limited Liability Co., a Wyoming limited liability company; and Colorado National Bank, a federally chartered bank, as successor by merger to Bank Western, a federal savings bank, respectfully pray that a writ of certiorari issue to review the judgment of the Colorado Supreme Court entered in this proceeding on September 15, 1997, in order to confirm the continuing force of preexisting United States Supreme Court cases directly addressing the important federal question presented herein, to resolve the conflict between the Colorado Supreme Court and the highest state court of another state addressing the issue, and to prevent the infringement of fundamental constitutional rights.

OPINIONS BELOW

The opinion of the Colorado Supreme Court which gives rise to this petition is printed in Appendix A hereto, and is reported at 945 P.2d 395 (Colo. 1997). The Colorado Supreme Court's order denying petitioners' request for rehearing is attached hereto as Appendix B.

JURISDICTION

The Colorado Supreme Court entered the judgment (Appendix A) for which petitioners seek review on September 15, 1997. It entered its order denying the petition for rehearing on October 20, 1997. Pursuant to Supreme Court Rule 13, this Petition for Writ of Certiorari is timely filed. The jurisdiction of this court is invoked pursuant to 28 U.S.C. § 1257, that a statute of the State of Colorado is drawn into question as repugnant to the Constitution of the United States.

This Petition for Writ of Certiorari draws into question the constitutionality of a Colorado statute. The State of Colorado itself is not a party, but Arapahoe County is. Under Colorado law, Arapahoe County is a political subdivision, an agency, of the State. Nevertheless, in the event that 28 U.S.C. § 2403(b) applies, petitioners have served this Petition for Writ of Certiorari on the Attorney General of Colorado, Honorable Gale A. Norton.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitutional Provisions

The Fifth Amendment to the Constitution of the United States of America provides, in pertinent part, that

> "No person shall. . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation."

The Fourteenth Amendment to the Constitution of the United States, § 1, provides in pertinent part that

> ". . . . No state shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

Statutory Provisions

The statutory provisions involved in this case are Colorado Revised Statutes (C.R.S.) 39-12-103 (imposition of redemption interest); 39-10-114 (abatement and refund procedures); and 39-5-122 and 39-8-109 (protest and adjustment procedures), all as in effect at the relevant times to this case. Because of their length, the relevant portions of these statutes are set forth in Appendix C, attached hereto.

STATEMENT OF THE CASE

Petitioners, separately, are owners of real estate in Arapahoe County, Colorado who did not timely pay their property tax assessments, in substantial part because the property had been greatly overvalued by the County Assessor, in some cases by over 1,000%. As a result, the taxes were sold several months after the due date to third party tax certificate purchasers, or sold to the County itself, at a statutory tax sale. Pursuant to C.R.S. 39-12-103, redemption interest (at a rate during the relevant times of

15-16%) began to accrue from the date of the tax sale on the aggregate of the principal amount of the taxes and accrued delinquent interest and tax sale costs.

To remedy the overassessment, petitioners timely petitioned for an abatement or refund, or adjustment, of their property taxes in accordance with the procedures and time requirements set forth under Colorado law (C.R.S. 39-10-114; and 39-8-109 and 39-5-122). Although the statutory process to contest the accuracy of the tax assessment took at least one and a half years, longer in the case of certain of the petitioners, the taxing authorities eventually agreed the assessments were erroneous, and ordered reductions which collectively (and in some cases separately as well) totaled several million dollars in the valuation of the petitioners' properties, resulting in a reduction in their property taxes which collectively (and in some cases separately as well) amounted to hundreds of thousands of dollars. By way of example, petitioner Dove Valley's 1989 valuation was reduced by a total of $4,828,084.00, from $10,076,590.00 to $5,248,406.00, a reduction of 48%. Reduction of the valuation resulted in a corresponding reduction of the 1989 property taxes by a total of $189,394.43, from $396,119.72 to $206,725.29. The County charged Dove Valley $206,725.29 (the corrected tax), plus interest at 15-16% on $206,725.29 (the corrected tax) *and on $189,394.43* (the erroneous tax), for the 1989 taxes *and for succeeding years* until the assessment was corrected and the taxpayer redeemed. Other petitioners were equally successful in obtaining substantial tax reductions, and were charged like redemption interest penalties thereon.

Thus, petitioners must pay a penalty in the form of redemption interest, not only on the corrected amount of taxes (*petitioners do not challenge these charges*) *but also on the wrongfully assessed taxes, i.e., that amount by which the original taxes were reduced,* in order to redeem their property from the effects of the tax sale. With regard to those parcels which petitioners had redeemed prior to the tax abatement, the County refused to credit the redemption interest penalty it had charged on the erroneous portion of the taxes. This injustice was repeated in succeeding years until the taxing authorities ordered reductions and the petitioners redeemed. The penalty charged by the County on the erroneously assessed taxes amounted to an aggregate of several hundred thousand dollars for all petitioners.

The petitioners each filed suit in December of 1993, setting forth their several claims for a refund or credit of the redemption interest charged on the wrongfully assessed taxes. Plaintiffs asserted in the first claim for relief of their respective complaints that the County's conduct in charging them redemption interest (at a rate of 15 to 16% per annum) on taxes which were illegally or erroneously assessed by the County Assessor is proscribed by the Fifth and the Fourteenth Amendments to the United States Constitution, because it is an impermissible taking of private property without due process and without just compensation. Petitioners also claimed a refund or credit on equitable, and statutory interpretation, grounds, asserting that C.R.S. 39-10-114(1)(b) providing for refund interest in the event of a tax abatement must, in order to meet constitutional mandates, be interpreted to include a refund of interest for the period

during which the County charged redemption interest penalty on the abated amount. The court ordered a consolidation of all cases. After a hearing on petitioner's Motion for Summary Judgment [there were no material issues of fact, the County simply taking the position that it was acting in accordance with a taxing scheme mandating collection of redemption interest on taxes which were not paid by the time of the statutory tax sale, and that redemption interest was to be calculated on the original tax levy, not the corrected tax levy,] the trial court dismissed all of petitioners' claims.

Petitioners appealed the trial court's dismissal of their constitutional claim, as well as their equitable and statutory interpretation claims, to the Colorado Court of Appeals. The Court of Appeals affirmed as to that part of the trial court's order that allowed the County to exact redemption interest, without refund or credit, on the illegal or erroneously assessed taxes until redemption by the taxpayer. It did rule, on statutory interpretation grounds, that the County must refund delinquent interest charged on the erroneously assessed taxes *up to the date of the tax sale*, but this constituted a very small part of the total interest charged by the County on the erroneously assessed taxes for the taxpayer to redeem (delinquent interest is charged at 12% per annum to the date of tax sale, and redemption interest is charged at 15-16% per annum from the date of the tax sale until the date of redemption).

In February of 1996, petitioners petitioned the Colorado Supreme Court for a writ of certiorari to review the opinion of the Colorado Court of Appeals upholding the power of the County to exact redemption interest on the

erroneously assessed taxes. By its Order of September 23, 1996, the Colorado Supreme Court granted review of petitioners' constitutional and equitable claims to a refund or credit of redemption interest, but denied review of their statutory interpretation claim.

On September 20, 1997, the state Supreme Court affirmed the decision of the Court of Appeals on grounds which differed dramatically with the rationale of the Colorado Court of Appeals. The Court of Appeals had held that petitioners' tax abatement was a property interest under state law, and the County's charging of redemption interest on the erroneous portion of the tax assessment constituted a taking of petitioners' property. Nevertheless, the court had held the taking to be constitutionally permissible as a legitimate means of enforcing timely payment of the assessed taxes and assuring a regular stream of income for the County. The Colorado Supreme Court also reasoned that redemption interest furthers the goal of providing a consistent source of income by discouraging taxpayers from allowing their properties to go to a tax lien sale and by encouraging third parties to purchase the tax liens. However, it affirmed on the basis that the redemption interest charged under Colorado's statutory taxing scheme is a legitimate penalty, an additional charge, and can be calculated in any manner the legislature sees fit. It held that the legislature determined the penalty is to be calculated on the amount of taxes paid at the tax sale by the purchaser of the tax lien, rather than on the amount of taxes later determined to have been lawfully owed. Finally, it reasoned that redemption in Colorado is a mere privilege, a gratuity given by the legislature, and so no taking occurred when the County

charged a penalty in the form of redemption interest as required by statute, and a taxpayer has no reasonable expectation based upon state law of being exempt from this penalty.

The decision of the Colorado Supreme Court raises an important issue arising under the United States Constitution, and resolves that issue in a manner entirely inconsistent with existing precedent of the United States Supreme Court dating back to 1886 directly addressing the issue, and which petitioners assert this Court should reaffirm. Further, the decision is contrary to the principles of due process, and the protections from arbitrary governmental takings, set forth in the Fifth and Fourteenth Amendments to the United States Constitution, and articulated by the United States Supreme Court in *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 101 S. Ct. 446, 66 L.Ed.2d 358 (1980), and *Harper v. Virginia Dept. of Taxation*, 113 S. Ct. 2510, 125 L.Ed.2d 74 (1993).

REASONS FOR GRANTING CERTIORARI

The issue presented by this Petition for Writ of Certiorari is a matter of concern not only to Colorado property owners, but potentially to all taxpayers nationwide. The decision of the Colorado Supreme Court allows Colorado counties, when an original tax levy is not timely paid (even when overassessment makes timely payment impossible or impracticable), to exact a penalty on that portion of the taxes which are determined by the taxing authorities themselves to have been erroneously assessed.

This results in such fundamental unfairness to the taxpayer that it should be reviewed by this Court. If Colorado can enact a taxing scheme mandating a penalty be imposed against the taxpayer on taxes the County erroneously assessed, then it opens the gate for other states to raise revenues in this arbitrary manner, not limited to property taxes. Further, as onerous a burden as it is for these petitioners to have to pay this very substantial penalty for taxes it does not owe in order to save their property from the effects of the tax sale, the burden may well be even more onerous to the small business owner or homeowner who may not be able to pay even $1,000 more in penalties on taxes it does not owe.

Petitioners assert that tax collection statutes can only be rationally related to a legitimate governmental interest to the extent they may authorize sanctions for delinquent taxes which have been legally assessed. Where the taxes have been wrongfully assessed and are determined not to be owed, exacting a penalty in the form of redemption interest serves no lawful purpose. The Colorado Supreme Court's decision allows the County to charge an innocent taxpayer redemption interest on money which he does not owe simply to obtain money it cannot keep, because the County must refund or credit the principal amount of the tax abatement. In effect, this allows the County to borrow and use money at the rate for redemption interest and force a few taxpayers to pay that interest on its behalf. This also creates a disincentive for the County to do a diligent job in properly valuing the property in the first instance, since it is the beneficiary of its own over-assessment. Petitioners assert that the concepts of justice and fairness, as set forth in the Due Process and Taking

Clauses of the Fifth and Fourteenth Amendments to the United States Constitution, mandate that the government itself and not the taxpayer pay the interest when the County borrows money in this manner based upon its own erroneous assessment.

I. The Colorado Supreme Court's decision on this important federal question conflicts with established but older precedent of the United States Supreme Court, and the Court should reaffirm this precedent.

The decision of the Colorado Supreme Court runs directly contrary to decisions of the United States Supreme Court in *County of San Bernardino v. Southern Pac. R. Co.*, 118 U.S. 417, 6 S. Ct. 1144, 30 L.Ed. 125 (1886) and *County of Santa Clara v. Southern Pac. R. Co.*, 118 U.S. 394, 6 S. Ct. 1132, 30 L.Ed. 118 (1886). These cases hold that a taxpayer cannot, under any circumstances, be held liable for a penalty for not paying property taxes arising out of an invalid assessment. Under Colorado statute, particularly C.R.S. 39-10-114 and 39-8-109, the tax abatement at issue could only have been made upon a determination that the taxes at issue were illegally or erroneously assessed, i.e., invalid, and therefore, under no circumstances could any penalty lawfully be assessed on the abated portion of the taxes.

As in our case, the *Southern Pacific Railroad* cases involved the imposition by the county of excessively assessed property taxes for several years. As in our case, the taxes were not paid when due, were contested, and an eventual resolution determined that the taxes had been overassessed. Nevertheless, just as in our case, the county

asserted it had a right to charge a penalty against the railroads on the illegally or erroneously assessed tax amount from the due date. The equities are even stronger in our case, inasmuch as Arapahoe County would not allow the petitioners to redeem their property by paying the correct amount of taxes and penalty thereon, and determining any further liability for redemption interest in a later proceeding. In the *Southern Pacific Railroad* cases, Justice Harlan needed little analysis to conclude what seems to these taxpayers to be a matter of fundamental fairness:

> "The plaintiff not, then, being entitled to judgment for the taxes originally in question, and the parties having stipulated that the judgment entered for the plaintiff, with the consent of the defendant, should not be treated as an admission by the latter of the validity of the taxes claimed, it follows that the plaintiff cannot have judgment in its favor for penalty, interest, and attorney's fees. Apart from every other view, *the defendant could not be adjudged liable for penalty, interest, or attorney's fees for not paying taxes arising out of an invalid assessment, and which, under the law, were not collectible by suit. Judgment affirmed."* [*County of San Bernardino*, 118 U.S. at 422, 6 S. Ct. at 1146.] [Emphasis Supplied]
>
> ". . . . It follows that there is no occasion to determine under what circumstances the plaintiffs would be entitled to judgment against a delinquent taxpayer for penalties, interest, or attorney's fees; for, *if the plaintiffs are not entitled to judgment for the taxes arising out of the assessments in question, no liability for penalties,* interest, or attorney's fees could result from a refusal or

> failure to pay such taxes. Judgment affirmed." [*County of Santa Clara*, 118 U.S. at 417, 6 S. Ct. at 1143.] [Emphasis supplied]

Justice Field concurred, stating

> ". . . . of course, no penalties for not paying an illegal tax, and no attorney's fees charged for the attempt to collect them, could be recovered, and for a like reason the interest of 2% a month claimed could not be demanded. . . . " [*County of San Bernardino*, 118 U.S. at 425, 6 S. Ct. at 1148.]

Petitioners have found no more recent United States Supreme Court cases in which the *Southern Pacific Railway* cases have been questioned in any way for the principles cited above. While these decisions are not expressly based on the Fifth and Fourteenth Amendments to the United States Constitution, the concepts of fundamental fairness and justice encompassed by the Due Process and Taking Clauses dictate such a conclusion.

II. The Colorado Supreme Court's decision sustains the validity of a state statutory taxing scheme which violates the Due Process Clause and the Taking Clause of the Fifth and Fourteenth Amendments to the United States Constitution.

Under the protections afforded by the Fifth Amendment to the United States Constitution, made applicable to the states by the Fourteenth Amendment to the Constitution (*Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 122, 98 S. Ct. 2646, 2658, 57 L.Ed.2d 631 (1978)), the government may not take private property for public use

without payment of just compensation. Colorado recognizes that rights acquired by judgment or decree constitute constitutionally protected property interests. *Kirk v. Denver Pub. Co.*, 818 P.2d 262 (Colo. 1991). This includes decisions of an administrative tribunal. 16C CJS, *Constitutional Law*, § 982 and 983. *La Plata River & Cherry Creek Ditch Co. v. Hinderlider*, 25 P.2d 187 (Colo. 1933). Thus, the petitioners' tax abatement awards, recovered through statutorily prescribed administrative channels, are constitutionally protected property interests. The Colorado Court of Appeals recognized this in its decision, though concluding that the taking of this property interest by exacting redemption interest against it was constitutionally permissible because it helped assure a regular flow of income (see Appendix A, pg. App. 6, reference in the Opinion of the Colorado Supreme Court). The Colorado Supreme Court reasoned that since redemption was a legislatively granted gratuity and not a constitutional right, a penalty in the form of redemption interest could be imposed by the legislature even on erroneously assessed taxes, that the taxpayer had no reasonable expectation of paying the penalty only on the corrected tax amount, and thus there was no property interest implicated and no taking.

The Colorado Supreme Court is only partly correct in its statement that redemption is a legislative gratuity which may be restricted. As stated at 85 CJS *Taxation*, § 841, the legislature's authority to impose conditions on the right to redeem is still subject to constitutional protections. Thus, regardless of whether the right of redemption is a mere privilege, the taxpayers' abatement awards were still judgments, property interests under Colorado

law, which could not be taken away without due process or payment of just compensation. The charging of redemption interest on the erroneously assessed taxes diminished the judgment, and was therefore a governmental appropriation of the award.

The Colorado Supreme Court's decision is not reconcilable with this Court's holding in *Webb's Fabulous Pharmacies, Inc. v. Beckwith, supra.* As in our case, *Webb's* involved the state's taking of plaintiffs' money and interest, specifically the constitutionality of a state statute authorizing a county to take the interest accruing in an interpleader fund deposited into the registry of the County Court under circumstances where another statute imposed a fee for the Clerk's services in receiving the fund into the registry. The U.S. Supreme Court rejected the notion that the statute created a valid fee for services and held that the county's retention of the interest fund violated the Taking Clause of the Fifth Amendment. This Court reasoned that the state had not merely adjusted the benefits and burdens of economic life to promote the common good, but had exacted a forced contribution to general governmental revenues not reasonably related to the costs of using the courts. It concluded

> "To put it another way: a State, by *ipse dixit,* may not transform private property into public property without compensation, even for the limited duration of the deposit in court. This is the very kind of thing that the Taking Clause of the Fifth Amendment was meant to prevent. That Clause stands as a shield against the arbitrary use of governmental power." [*Webb's Fabulous Pharmacies,* 449 U.S. at 164, 101 S. Ct. at 452.]

The Colorado Supreme Court's decision, in a very similar manner, allows Arapahoe County to exact a forced contribution to general governmental revenues not reasonably related to the legitimate costs of collecting lawful taxes, because the penalty imposed under the statutory taxing scheme is calculated not only on the corrected tax amount which the taxpayers failed to timely pay, but also on the taxes which were determined to have been erroneously assessed in the first place. Petitioners assert that this is truly an arbitrary use of governmental power, which the Taking Clause of the Fifth Amendment was meant to prevent.

The Colorado Supreme Court acknowledged that constitutional due process, as articulated by the United States Supreme Court in *Harper v. Virginia Dept. of Taxation, supra,* and *McKesson Corp. v. Div. of Alcoholic Beverages & Tobacco,* 496 U.S. 18, 110 S. Ct. 2238, 110 L.Ed.2d 17 (1990), requires that taxpayers either have an opportunity to have the legality of the tax assessment determined before having to pay [or face sanctions such as the redemption interest penalty], or, if that opportunity is not provided, that the taxing authorities provide meaningful backward looking relief such as a full refund.

> "The constitutional sufficiency of any remedy thus turns (at least initially) on whether Virginia law 'provides an adequate form of predeprivation process, for example, *by authorizing taxpayers to bring suit to enjoin imposition of a tax prior to its payment, or by allowing taxpayers to withhold payment and then interpose their objections as defenses in a tax enforcement proceeding,*" citing *McKesson.* [*Harper,* at pg. 2520 of 113 S. Ct.] (Emphasis supplied)

The Colorado Supreme Court further recognized that Colorado's property tax collection scheme does not guarantee predeprivation relief in that sanctions and summary remedies were imposed in the form of the redemption interest penalty before the petitioners' objections to the tax's validity could be resolved. Therefore, the Colorado court agreed that meaningful backward looking relief such as a full refund must be provided.

> "On the other hand, if no such predeprivation remedy exists, 'the Due Process Clause of the Fourteenth Amendment obligates the state to provide meaningful backward-looking relief to rectify any unconstitutional deprivation' ". [*Harper*, at pg. 2519 of 113 S. Ct.]

However, the Colorado Supreme Court only gave lip service to this principle, stating that the "full refund" mandated by the Due Process Clause was given in the form of a refund of the principal amount of the abated taxes. The court declined to recognize that the County's collection of the redemption interest penalty on the abated tax amount effectively made the relief provided fall far short of the "full refund" which petitioners assert is constitutionally mandated.

Petitioners assert full refund must of necessity, in order to make these taxpayers whole, include both the abatement of wrongfully assessed taxes *and the redemption interest penalty charged on the wrongfully assessed taxes.* In *Library of Congress v. Shaw*, 478 U.S. 310, 317 n.5, 106 S. Ct. 2957, 2962 n.5, 92 L.Ed.2d 250, 259 n.5 (1986), and *Jacobs v. U.S.*, 290 U.S. 13, 54 S. Ct. 26, 78 L.Ed. 142 (1933), this Court held that the Fifth Amendment requires interest be paid when the government takes private property for

public use when the circumstances require to truly make a taxpayer whole.

> "The amount recoverable was just compensation, not inadequate compensation. The concept of just compensation is comprehensive and includes all elements, 'and no specific command to include interest is necessary when interest or its equivalent is a part of such compensation.' " [*Jacobs*, 290 U.S. at pg. 17]

The United States Supreme Court has thus mandated that the relief provided under the Fifth Amendment's Due Process and Taking Clauses be truly *meaningful*. The petitioners would not have had to pay the redemption interest penalty if the validity of the tax had been determined beforehand. The Due Process and Taking Clauses of the Fifth Amendment stand as a shield from petitioners being denied their tax abatement by the government's exaction of a penalty on taxes which were never lawfully owed in the first place.

III. The Colorado Supreme Court's decision creates conflict between decisions of the highest court of the two states which have directly addressed this important federal question, and the United States Supreme Court should resolve that conflict for the future guidance of all states.

The Alaska Supreme Court recently addressed this same issue in *Cool Homes, Inc. v. Fairbanks*, 860 P.2d 1248 (Alaska 1993). There, just as in our case, the taxpayers did not pay the assessed property taxes when due and eventually obtained a reduction. However, prior to the order reducing the assessment, the taxing entity sought to foreclose its tax lien based on the original assessment, and,

just as in our case, even after the reduction, sought to collect penalties based on the original assessment. Just as in our case, the taxing entity argued that the taxpayer could have paid the taxes originally assessed and then sued for a refund, thereby avoiding penalties as well as foreclosure. The Alaska Supreme Court rejected that argument, holding that the penalties could not possibly be determined until the date of the reassessment because there was no figure on which to base them. It reasoned that there could be no delinquent tax until a "valid" tax is assessed, i.e., a correct tax assessment is made:

> ". . . . it seems appropriate to require an error free assessment before penalties can be imposed." [*Cool Homes* at pg. 876.]

In addition,

> ". . . . the taxpayer's right of redemption was impaired, because the taxpayer could not ascertain what amount it had to pay to avail itself of the right (of redemption)."

Even as to interest not designated as a penalty, the court held that although the accrual date may be the original due date of the taxes, interest could only be charged on "the amount later adjudicated as damages," i.e., the correct tax amount only.

Although there may be some differences in Colorado's statutory taxation scheme from that of Alaska's, the principles set forth by the Alaska Supreme Court are based upon concepts of fundamental fairness, and not on statutory interpretation. These principles should apply just as strongly to the Colorado legislature's enactments and the actions of Arapahoe County. The highest courts

of the states of Colorado and Alaska have addressed this important federal question, and have rendered conflicting decisions. Most of the other states have statutory property tax schemes which impose sanctions for delinquent tax payments. The United States Supreme Court should review petitioners' constitutional claims, to correct Colorado's imposition of unconstitutional penalties and to give guidance to other states.

CONCLUSION

To enforce the decisions of this Court with which the Colorado Supreme Court's decision conflicts on an important matter of federal law, to rectify the violation of the Due Process and Taking Clauses of the United States Constitution which the Colorado Supreme Court's decision authorizes, and to resolve the conflicts between the highest courts of the states which have addressed this important federal question, petitioners respectfully

request this Court grant their Petition for Writ of Certiorari.

Respectfully submitted,

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SUPREME COURT, STATE OF COLORADO
No. 96SC101 September 15, 1997

DOVE VALLEY BUSINESS PARK ASSOCIATES, LTD., a Colorado limited partnership; ABACUS GROUP REALTY HOLDING COMPANY II, a Delaware corporation, as successor by merger to DIVERSIFIED LAND HOLDINGS, INC., a Delaware corporation; HAVANA STREET, LTD., a Colorado limited partnership; GULLWING ACRES LIMITED LIABILITY CO., a Wyoming limited liability company; and COLORADO NATIONAL BANK, a federally chartered bank, as successor by merger to BANK WESTERN, federal savings bank,

Petitioners.

v.

THE BOARD OF COUNTY COMMISSIONERS OF ARAPAHOE COUNTY, COLORADO; and ADRIAN B. "BERNIE" CIAZZA, TREASURER, ARAPAHOE COUNTY, COLORADO,

Respondents.

Certiorari to the Colorado Court of Appeals

EN BANC JUDGMENT AFFIRMED

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JUSTICE BENDER delivered the Opinion of the Court.

JUSTICE SCOTT does not participate.

In this property tax case, the respondents, the Arapahoe County Board of Commissioners (the county) and the Treasurer of Arapahoe County (the treasurer), refused to return the redemption interest paid by the petitioners (the taxpayers) on that portion of the taxpayers' real property taxes which was determined to be excessive and was refunded as a result of later protest and abatement proceedings. The taxpayers sued, claiming that the county and the treasurer violated the takings clauses of the United States and Colorado Constitutions and were unjustly enriched. The district court dismissed the taxpayers' complaint for failure to state a claim upon which relief can be granted. The court of appeals affirmed in *Dove Valley Business Park Associates v. Board of County Commissioners*, 923 P.2d 242 (Colo. App. 1995), holding that any taking that occurred was constitutionally permissible and that the county had not been unjustly

enriched. The taxpayers petitioned this court for certiorari review of the decision of the court of appeals.[1]

We hold that redemption interest is a statutorily imposed penalty, an additional charge, which must be calculated based on the amount of taxes paid by the purchaser of a tax lien rather than on the amount of taxes determined to have been actually owed at a later protest or abatement proceeding. § 39-12-103, 11 C.R.S. (1997). Redemption interest is a penalty exacted from the taxpayer for the privilege of redemption because the taxpayer failed to pay property taxes before the property was sold at a tax lien sale. *Id.* Because the taxpayer has no reasonable expectation based on state law of being exempt from this penalty, we hold that no taking occurs when the county charges redemption interest as required by statute. We further hold that the county was not unjustly enriched by the taxpayers' payment of this penalty because the taxpayers conveyed no benefit to the county. We affirm the court of appeals, but differ in our reasoning.

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[1] The issues were framed on certiorari as follows:

Did the Court of Appeals err in determining that the County's assessment against the taxpayer of redemption interest on erroneously assessed taxes is a constitutionally permissible taking of petitioners' property?

Did the Court of Appeals err in determining that petitioners' equitable claim of unjust enrichment must fail because the county assertedly did not receive a benefit from the taxpayer, did not encourage or initiate the transaction which it benefited from, and is not typically the principal beneficiary of redemption interest?

I.

The taxpayers each own parcels of commercial real property located in Arapahoe County.[2] For the tax years 1989, 1990, and/or 1991, the Arapahoe County Assessor overvalued these parcels by as much as 48% above their actual value. The taxpayers failed to pay their taxes for the years in which their properties were overvalued, and the treasurer conducted a tax sale at which third party bidders purchased tax liens on some of these properties. Properties of the taxpayers on which no bids were submitted at the sale were removed from the county tax rolls.

The taxpayers then redeemed much of their property by paying the amount of the erroneous tax assessment, delinquent interest on the erroneous assessment, redemption interest on the erroneous assessment, and the costs of the sale. Delinquent interest is interest that accrues when the taxpayer fails to pay property taxes by the statutory due date. § 39-10-104.5, 11 C.R.S. (1997).

One of the taxpayers, Havana Street, Ltd., filed a protest upon receiving the notice of valuation from the assessor. The other taxpayers waited until after the tax lien sale and then petitioned for abatement and refund. The protest and the petitions for abatement were denied by the assessor and the assessor's denial was affirmed on appeal to the Arapahoe County Board of Equalization (BOE). Further appeal to the State Board of Assessment Appeals (BAA) resulted in a substantial lowering of the

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[2] This case originally consisted of four individual cases which were consolidated by the district court because they involved identical questions of law.

assessed values of all the taxpayers' properties and an order to the treasurer to abate the taxes.

The county refunded the erroneously levied taxes, but refused to pay any refund interest for having held the taxpayers' money in error. Refund interest is interest paid to the taxpayer on the amount of the refunded payment. § 39-10-114(1)(b), 11 C.R.S. (1997). In addition, the county refused to return to the taxpayers the delinquent interest and the redemption interest that the taxpayers paid on the portion of the tax assessment determined to be excessive. The taxpayers sued the county and the treasurer, arguing that the county's refusal to pay these amounts constituted a violation of the statutory scheme, an unconstitutional taking, and unjust enrichment.

The taxpayers moved for summary judgment, and the county and the treasurer responded by moving to dismiss for failure to state a claim upon which relief can be granted. After a hearing, the district court issued a declaratory judgment that the taxpayers were not statutorily entitled to refund interest, nor were they entitled to a reimbursement of the delinquent interest and the redemption interest paid on the abated portion of the taxes. The district court held that the statutory scheme was neither unconstitutional nor inequitable, and that the taxpayers failed to present any evidence in support of their claims. The district court dismissed the taxpayers' claims for failure to state a claim.

The taxpayers appealed. The court of appeals agreed with the taxpayers that the county was required to pay refund interest and to reimburse the taxpayers for delinquent interest paid on the abated portion of the taxes. *See*

Dove Valley, 923 P.2d at 245, 248. However, the court of appeals agreed with the district court that the county was not required by statute to reimburse the taxpayers for redemption interest paid on the abated portion of the taxes. *See id.*

Having determined that the county was statutorily entitled to retain the redemption interest paid on the erroneously levied taxes, the court of appeals turned to the question of whether this statutory procedure constituted an unconstitutional taking. *See id.* The court stated that the abatement award was a judgment, and therefore a property interest which cannot be taken by the government without following due process of law requirements or payment of just compensation. *See id.* at 249. The court assumed for purposes of its analysis that the charging of redemption interest on the erroneously assessed taxes diminishes the effect of the judgment and therefore constitutes a governmental appropriation of the award. *See id.* The court of appeals reasoned, however, that this taking was permissible because it was rationally related to the important and legitimate governmental interest in the regular receipt of public revenue. *See id.*

The court of appeals also held that the county had not been unjustly enriched by retaining the redemption interest paid by the taxpayers on the erroneous assessment. *See id.* at 250. The court of appeals noted that when a third party purchases the tax lien, the county receives no benefit because redemption interest accrues to the buyer rather than to the county. *See id.* at 251. The court of appeals acknowledged that the taxpayer does pay redemption interest to the county when no investor can

be found to purchase the tax lien. *See id.* The court reasoned that any benefit to the county under these circumstances was not inequitable because the county did not act in bad faith. *See id.*

The court of appeals remanded with instructions for the district court to order the county to pay refund interest and to reimburse the taxpayers for the delinquent interest paid on the erroneously levied taxes. *See id.* The taxpayers petitioned this court for certiorari review on the issue of whether the county effected an unconstitutional taking or was unjustly enriched by refusing to reimburse the taxpayers for redemption interest paid on the erroneously levied taxes. We affirm the holding of the court of appeals that the county's refusal to return a portion of the redemption interest in this case was constitutional and did not constitute unjust enrichment, but we employ different reasoning.

II.

Each year, the assessor for each county values the real property within the county for tax purposes and notifies property owners of the valuation of their property. *See generally* § 39-1-103(5)(a), 11 C.R.S. (1997). Property owners who believe that their land has been overvalued may file an immediate protest with the assessor, who conducts a hearing and issues a decision. *See* §§ 39-5-121 to -122, 11 C.R.S. (1997). The statutory scheme provides for subsequent review by the BOE, *see* § 39-8-106, 11 C.R.S. (1997), by the BAA, *see* § 39-8-108, 11 C.R.S. (1997), and by state appellate courts, *see id.* If the

taxpayer prevails, the treasurer reduces the tax to reflect the proper assessment.

Although statutory deadlines ensure that this procedure occurs as expediently as possible, the legislative scheme contemplates that in some cases the tax will become due before the resolution of the protest. *See* § 39-8-109, 11 C.R.S. (1997); *Gates Rubber Co. v. State Bd. of Equalization*, 770 P.2d 1189, 1193 (Colo. 1989); *Board of Assessment Appeals v. Benbrook*, 735 P.2d 860, 865 (Colo. 1987). Should taxes become due before the completion of the protest procedure, the taxpayer must pay the amount of the assessment, and if the protest is successful, the treasurer refunds the overpayment of taxes and any delinquent interest paid on the amount of the overassessment, together with refund interest at one percent per month. *See* § 39-8-109 (stating that the taxpayer will receive a refund if a protest is successful); § 39-10-114(1)(a)(I)(A), 11 C.R.S. (1997) (providing for a refund of taxes levied erroneously or illegally and penalty interest thereon); *Gates Rubber Co.*, 770 P.2d at 1193; *Benbrook*, 735 P.2d at 865.

Protest is not the only remedy available to a property owner whose property is overvalued by the assessor. The property owner may elect to pay the taxes by the due date and then petition the board of county commissioners for an abatement and refund. *See* § 39-1-113, 11 C.R.S. (1997). The board of county commissioners conducts a hearing on the petition and makes a recommendation to the state tax administrator, whose decision may be appealed by the taxpayer to the BAA. *See* § 39-2-125(1)(b), 11 (1997). The taxpayer, if successful, receives a refund of the overpayment of taxes and any penalty interest paid

on the amount of the overassessment, together with refund interest at one percent per month.

Neither the protest procedure nor the abatement procedure suspends the deadline for the payment of property taxes. Taxpayers must pay their property taxes by the due date regardless of the fact that a protest may be pending or that the taxpayer may intend to file a petition for abatement. *See* § 39-10-104.5(3)(b), 11 C.R.S. (1997). Failure to pay taxes in a timely manner results in the accrual of delinquent interest in the amount of one percent per month. *See id.* In addition, a tax lien attaches against the property for the amount of taxes levied against the property together with any delinquent interest, costs, and fees. *See* § 39-1-107, 11 C.R.S. (1997).

The county treasurer is required to hold a public auction for the purpose of selling these tax liens to third party investors. *See* § 39-11-101, 11B C.R.S. (1997). To purchase a tax lien, the investor must pay the taxes levied against the property, the accrued delinquent interest, and the costs of the sale. *See* § 39-11-115, 11 C.R.S. (1997). In exchange, the purchaser acquires a certificate of purchase which operates as a lien against the property. Three years from the date of the tax lien sale, the tax certificate holder, upon paying all subsequent taxes due on the property, is entitled to receive a deed to the property from the treasurer. *See* § 39-11-120, 11 C.R.S. (1997).

If a property generates no bids at the tax lien sale, then the treasurer must strike off the tax liens on those properties for the amount of taxes, delinquent interest, and costs, and remove this property from the county tax rolls. *See* § 39-11-108, 11 C.R.S. (1997). The treasurer

issues a certificate of purchase to the county, *see id.*, which becomes the owner of the lien. Although the county is not required to undergo "the useless form of paying the price with one hand and receiving it with the other," the legal effect of the treasurer striking off land to the county is that of a sale. *See* 72 Am. Jur. 2d *State and Local Taxation* § 956 (1974). The county is considered a "purchaser" who has paid the taxes levied against the property, the accrued penalty interest, and the costs of the sale. *See* § 39-11-142, 11 C.R.S. (1997); *Tarabino Real Estate Co. v. Dunlavy*, 105 Colo. 523, 525-26, 99 P.2d 926, 927-28 (1940). Subsequent taxes levied against parcels held by the county in this manner do not become payable unless the county sells the tax lien or the property is redeemed by the owner. *See* § 39-11-108. Like any other purchaser, the board of county commissioners may apply for and receive a deed to the property three years after the sale. *See* § 39-11-142.

Any time before the tax lien sale the taxpayer may recover his property by paying the amount of tax assessed together with penalty interest. After the tax lien sale, the taxpayer may redeem by paying the amount of taxes, delinquent interest, and costs paid by the purchaser of the tax lien with redemption interest[3] on this amount. If the certificate holder paid taxes on the property after the sale, then the taxpayer also must pay the taxes paid plus redemption interest in order to redeem. *See* § 39-12-103(3), 11 C.R.S. (1997). All monies received by the treasurer for the redemption of land is delivered to

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[3] Redemption interest is nine percentage points above the discount rate, which in this case was approximately 15-16%. *See* § 39-12-103(3).

the holder of the tax lien certificate. *See* § 39-12-108, 11 C.R.S. (1997). It is the duty of the treasurer to exact payment from the taxpayer for the purchaser's entire purchase money, plus statutory interest, charges, and penalties, and to deliver this money to the purchaser. *See id.; see also* § 39-12-103(3), 11 C.R.S. (1997); § 39-11-130, 11 C.R.S. (1997); *Statton v. People ex rel. Burr*, 18 Colo. App. 85, 91-92, 70 P. 157, 159 (1902). After the treasurer issues a deed to the purchaser, the taxpayer no longer has a property interest in the real estate and may no longer redeem.

The purpose underlying this scheme is to ensure that the county has a consistent source of revenue. *See Liebhardt v. Department of Revenue*, 123 Colo. 369, 374, 229 P.2d 655, 658 (1951) (stating that the prompt payment of taxes is "imperatively necessary" and that "delay cannot be tolerated"). If the county cannot compel the taxpayer to pay property taxes on the parcel, then the county must find someone who will or else strike the property from the county tax rolls and suffer a loss of revenue. Ideally, the taxpayer pays his taxes before the tax lien sale so that the county avoids the possibility that the property will generate no bids, resulting in a loss of revenue. However, should the property go to tax lien sale, it is imperative that the county find an investor to purchase the lien.

Redemption interest furthers the goal of providing a consistent source of income by discouraging taxpayers from allowing their properties to go to a tax lien sale and by encouraging third party bidding as purchasers of the tax liens. Redemption interest is a penalty which the taxpayer must pay in order to recover property after the taxpayer allows the property to go to a tax lien sale. *See*

Herbert Thorndike Tiffany, *The Law of Real Property* § 1248, at 1153 (3d ed. 1975)("The owner of the land . . . is ordinarily required to pay a penalty, calculated in interest at a high rate."); 85 C.J.S. *Taxation* § 874(b)(1954) (stating that statutory penalties for redemption must be paid and shall be strictly construed); *see generally Black's Law Dictionary* 1133 (6th ed. 1990) (defining penalty as "a sum of money which the law exacts payment of by way of punishment for doing some act which is prohibited or for not doing some act which is required to be done"). In addition, redemption interest encourages investors to purchase tax liens because of the promise of a high rate of return on the amount of taxes they paid at the sale. Finally, if no bidders come forward at the sale and the county becomes the purchaser by default, redemption interest provides the county with compensation for the burden of operating without the revenue that should have been generated by taxes on that property.

The policy underlying the right of redemption is the "general policy of the law that no man shall forfeit his estate because of his inability to meet engagements on the day prescribed by law for their payment." 72 Am. Jur. 2d *State and Local Taxation* § 988 (1974). Because the law favors redemption, redemption statutes are construed liberally to afford property owners ample opportunity to redeem. *See Notch Mountain Corp. v. Elliott*, 898 P.2d 550, 555 (Colo. 1995).

In Colorado, delinquent taxpayers have no constitutional right to redemption. Instead, redemption is a statutory privilege created by the General Assembly which may be exercised only as provided by statute. *See id.* Consequently, despite the policy in favor of redemption,

redemption is "a gratuity which, if granted, may be restricted" as the legislature deems appropriate. *See* 72 Am. Jur. 2d *State and Local Taxation* § 994 (1974). Redemption interest, then, is a statutorily determined penalty exacted from the taxpayer for the privilege of redemption. *See Weston Inv. Co. v. State*, 189 P.2d 262, 264 (Cal. 1948) (stating that redemption is a privilege and that "[r]edemption penalties are imposed as a condition of being relieved from the consequences of the sale"); *Skach v. Sykora*, 127 N.E.2d 453, 457 (Ill. 1955); 85 C.J.S. Taxation § 874 (1954) (stating that redemption statutes often provide for the payment of a heavy premium, calculated at an extraordinary rate, which serves as a penalty against the property owner).

III. Takings Clauses Claims

The taxpayers argue that the collection of redemption interest on an erroneous assessment amounted to an unconstitutional taking. We disagree.

The Fifth Amendment to the United States Constitution and Article II, sections 15 and 25 of the Colorado Constitution prohibit the government from depriving a person of life, liberty, or property, without due process of law, and from taking any person's property for public use without just compensation. Property interests " 'are defined by existing rules or understandings that stem from an independent source such as state law.' " *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 161 (1980) (quoting *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972)).

The state law on redemption interest is clear because the plain language of section 39-12-103(3) explicitly warns a taxpayer that redemption interest will accrue based on the amount of taxes *paid by the purchaser. See* § 39-12-103(3). The county charged the taxpayers redemption interest in the amount provided precisely by the General Assembly in section 39-12-103(3). This statutory scheme did not provide the taxpayers with any basis to conclude that if they failed to pay their property taxes in a timely manner, and later redeemed their property, that the redemption interest on the amount paid by the purchaser would not apply to them. Hence, the taxpayers had no reasonable expectation that they would be held accountable for a sum less than what was mandated by statute. As landowners, the taxpayers are charged with knowledge of the tax laws and are presumed to know that their actions, such as failure to pay property taxes, will lead to an encumbrance. *See Burtkin Assocs. v. Tipton*, 845 P.2d 525, 528 (Colo. 1993).

The taxpayers analogize this case to *Kirk v. Denver Publishing Co.*, 818 P.2d 262, 273 (Colo. 1991), in which we held that the government appropriation of a portion of a money judgment constitutes a taking. In *Kirk*, we found that a statute which required successful plaintiffs to pay one-third of all exemplary damages collected into a state general fund constituted an unconstitutional taking. The taxpayers argue that, likewise, the county's assessment of a redemption penalty reduced the taxpayers' refund interest award. We are not persuaded. The *Kirk* decision turned on the fact that the statute at issue in that case could not be characterized as a penalty. *See id.* at 270. By contrast, the redemption interest at issue in this case is a

penalty. When the government exacts a penalty, it may deduct this penalty from a money judgment without effecting a taking. *See id.* (a penalty on a money judgment is not a taking); *see also Webb's Fabulous Pharmacies*, 499 U.S. at 162 (a legitimate fee for services charged on a money judgment is not a taking). Because the taxpayers had no reasonable expectation that they were exempt from this penalty, the redemption interest charged by the county implicates no property interest and there is no violation of the takings clauses.

The taxpayers urge that their situation is governed by the due process principles articulated in *Harper v. Virginia Department of Taxation*, 509 U.S. 86, 101 (1993), which held that a taxation scheme which denied the taxpayer a predeprivation opportunity to contest the validity of the tax assessment must provide meaningful backward-looking relief, such as a "full refund." The taxpayers assert, and we agree, that Colorado's scheme does not guarantee predeprivation relief. We also agree that due process requires meaningful backward-looking relief such as a "full refund." Colorado's property taxation scheme does provide for a full refund with interest for incorrectly or erroneously collected taxes, as the court of appeals held in this case. The taxpayers argue, however, that a portion of the redemption "interest," that is, the amount calculated on the abated tax, should be included as their "full refund" under *Harper*.

This argument misconceives the nature of redemption interest. Redemption "interest" is a misnomer because it does not represent funds accrued from money retained for the benefit of the taxpayers; this purpose is served by refund interest. *See Webb's Fabulous Pharmacies*,

449 U.S. at 161 (holding that interest from a fund held by the state government for the benefit of other third parties must be distributed among those entitled to the principal and must not be retained by the government); *Black's Law Dictionary* 812 (6th ed. 1990) (defining interest). The taxpayers are entitled to refund interest because they are entitled to the return of the overassessed taxes (the principal) plus a reasonable rate of interest. By contrast, redemption interest is a penalty, the calculation of which is statutorily prescribed. The fact that redemption interest is termed "interest" and is calculated by percentages does not alter its punitive purpose. Unlike a refund, the taxpayers are not entitled to reimbursement for the statutory penalty assessed because they failed to pay taxes in a timely manner. Because the taxpayers have received their "full refund" – their principal (the overassessed tax) plus interest – the *Harper* requirements of due process are met but do not extend to the refunding of redemption interest.

The taxpayers further argue that the calculation of redemption interest on the erroneously assessed taxes diminishes the effect of the judgment they obtained abating their taxes and as such constitutes a governmental appropriation of the award. We are unpersuaded. The county was required to hold the tax lien sales because of the taxpayers' decision not to pay the taxes when due. Thus, it was the conduct of the taxpayers which diminished the effect of the abatement award rather than any act by the government. Had the taxpayers timely paid their taxes they would have received the full amount of their abated award with interest. The county's actions in this case represented a valid exercise of the sovereign

power to assess and collect taxes, which is separate and distinct from the power to take private property for a public use. *See Burtkin Assocs.*, 845 P.2d at 529. The purpose of a tax lien sale is not to acquire property, but to "coerce negligent and unwilling citizens to pay their taxes." 85 C.J.S. *Taxation* § 744 (1954).

We find support for our reasoning in *Burtkin*, where the owner of real property claimed takings clauses violations when the state seized his property because the lessee failed to pay taxes as provided by the lease. We rejected the owner's argument in part because the owner failed to protect its property interests by using available statutory provisions which would have unconditionally exempted the property from tax liens. We upheld the seizure because the seizure was the result of the owner allowing its property rights to lapse and not the result of action by the state. *See id.* Similarly, the taxpayers in this case could have avoided the imposition of the penalty of accrual of redemption interest by paying their taxes before the tax lien sale.

The taxpayers argue that the option of paying the taxes is a practical impossibility, especially where, as here, the overassessment is substantial.[4] We acknowledge the taxpayers' argument that this statutory scheme will sometimes produce a harsh result. This is so because tension exists between the government's need to generate revenue and the property owner's rights to his property.

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[4] Dove Valley's abatement, for example, was in the amount of $189,394.43. The taxpayers argue that they were forced into the tax lien sale because they could not afford to pay the amount of the overassessment.

See generally Randall Thomsen, *Washington State Property Tax Foreclosures*, 32 Gonz. L. Rev. 123, 126 (1996-97). With respect to provisions for redemption, our General Assembly resolved these conflicting interests in favor of the county. Absent constitutional infringement, it is not our province to rewrite the statutes. *See Nelson v. City of New York*, 352 U.S. 103, 111 (1956) (stating that "relief from the hardship imposed by a state statute is the responsibility of the state legislature and not of the courts").

IV. Unjust Enrichment Claim

The taxpayers further contend that the county was unjustly enriched by its collection of redemption interest based on the amount of the erroneously assessed taxes rather than the lower tax later determined to be correct. We disagree.

Unjust enrichment, also known as a quasi-contract, or a contract implied in law, is an equitable principle which allows courts to avoid the unjust enrichment of one party at the expense of another by creating bargains where the parties have not done so. *See Moore & Co. v. T-A-L-L, Inc.*, 792 P.2d 794, 801 (Colo. 1990); Saul Levmore, *Explaining Restitution*, 71 Va. L. Rev. 65 (1985).

To recover restitution in a claim of unjust enrichment, a plaintiff must demonstrate "(1) that a benefit was conferred on the defendant by the plaintiff, (2) that the benefit was appreciated by the defendant, and (3) that the benefit was accepted by the defendant under such circumstances that it would be inequitable for it to be retained without payment." *Cablevision of Breckenridge,*

Inc. v. Tannhauser Condominium Ass'n, 649 P.2d 1093, 1096-97 (Colo. 1982).

A person confers a benefit by giving the adverse party the possession of, or an interest in, personal property by adding to the property of the adverse party or by saving the adverse party expense or loss. A benefit denotes any form of advantage. *See Ninth Dist. Prod. Credit Ass'n v. Ed Duggan, Inc.*, 821 P.2d 788, 801 (Colo. 1991).

Applying these principles we conclude no benefit was conveyed to the county by the taxpayers who paid redemption interest based on the statutorily required amount. When tax liens on the taxpayers' properties were purchased by third parties and then redeemed by the taxpayers, the county paid the full redemption interest to the tax lien purchasers and not to the county. Thus, the county received no benefit. Taxpayers' properties on which there were no bidders resulted in the county becoming the default purchaser, and the taxpayers' redemption interest payments constituted compensation for the burden placed upon the county by the taxpayers when they failed to provide the county a regular source of property tax revenue from the time of the tax sale. Hence, the taxpayers' payment of redemption interest in this latter category conveyed no advantage or benefit to the county. Therefore, we reject the taxpayers' argument that the county was unjustly enriched by the payment of redemption interest calculated on the basis of an assessment determined to be excessive at a date after the county conducted the tax lien sale.

The court of appeals held that any benefit conveyed by the taxpayers to the county was not unjust because the county did not act in bad faith in making the erroneous assessment. We do not reach the question of the circumstances under which any benefit was conveyed because we conclude that the taxpayers did not convey a benefit to the county.

The taxpayers argue that the county had the use of the taxpayers' erroneously assessed tax dollars interest free. This is simply not the case. As held by the court of appeals, the taxpayers are entitled to receive refund interest for the county's receipt of the erroneously assessed tax dollars. Compensation provided by refund interest is distinct from redemption interest. Redemption is a privilege which comes at a cost. "[R]edemption is a matter of legislative grace, which the legislature may withhold, enlarge, abridge, or curtail." 85 C.J.S. *Taxation* § 841 (1954).

V.

Summarizing, we hold that redemption interest is a statutorily imposed penalty, an additional charge, which must be calculated based on the amount of taxes paid by the purchaser of a tax lien rather than the amount of taxes determined to have been actually owed at a later protest or abatement proceeding. Redemption interest is a penalty exacted from the taxpayer for the privilege of redemption when the taxpayer fails to pay property taxes before the property is sold at a tax lien sale. Because the taxpayers have no reasonable expectation based on state law of being exempt from this penalty, we hold that no

takings clauses violations occur when the county charges redemption interest as required by statute. We further hold that the county was not unjustly enriched by the taxpayers' payment of this penalty because the taxpayers conveyed no benefit to the county. We affirm the court of appeals' dismissal of the taxpayers' claims.

JUSTICE SCOTT does not participate.

APPENDIX B

SUPREME COURT, STATE OF COLORADO
CASE NO. 96SC101
CERTIORARI TO THE COLORADO COURT
OF APPEALS, 94CA1883
DISTRICT COURT, ARAPAHOE COUNTY, 93CV2842

ORDER OF COURT

DOVE VALLEY BUSINESS PARK ASSOCIATES, LTD., a Colorado Ltd. Partnership; ABACUS GROUP REALTY HOLDING COMPANY II, a Delaware corporation, as successor by merger to DIVERSIFIED LAND HOLDINGS, INC., a Delaware corporation, HAVANA STREET, LTD., a Colorado limited partnership, and GULLWING ACRES LIMITED LIABILITY CO., a Wyoming limited liability company; and COLORADO NATIONAL BANK, a federally chartered bank, as successor by merger to BANK WESTERN, federal savings bank,

Petitioners,

v.

THE BOARD OF COUNTY COMMISSIONERS OF ARAPAHOE COUNTY, COLORADO; and ADRIAN B. "BERNIE" CIAZZA, TREASURER, ARAPAHOE COUNTY, COLORADO,

Respondents.

Upon consideration of the Motion for Permission to File an Answer to Motion for Clarification/Petition for Rehearing and the Petition for Rehearing filed in the above cause, and now being sufficiently advised in the premises,

IT IS THIS DAY ORDERED that said Motion for Permission to file an Answer to Motion for Clarification/

Petition for Rehearing shall be, and the same hereby is, DENIED.

IT IS FURTHER ORDERED that the Opinion is modified, and as modified, said Petition for Rehearing shall be, and the same hereby is, DENIED.

BY THE COURT, EN BANC, OCTOBER 20, 1997.
Justice Scott does not participate.

(SEAL)

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MAC V. DANFORD — CLERK OF COURT
COURT ADMINISTRATOR

October 20, 1997

Case No. 96SC101

Dove Valley v. Board of County Commissioners

Attached are replacement pages 5, 6, 9, 10, 11 and 12 in the above referenced case. Please substitute these pages for the like pages in the opinion that was announced on September 15, 1997.

The opinion has been modified, and, as modified, the petition for rehearing is denied.

Also attached are the redlined [underlined] pages indicating the modifications that were made.

MAC V. DANFORD
Clerk of the Supreme Court

/s/ Valerie Keisten
Deputy Clerk

:vk
Attachments

* * *

[p. 5] these properties. Properties of the taxpayers on which no bids were submitted at the sale were removed from the county tax rolls.

The taxpayers then redeemed much of their property by paying the amount of the erroneous tax assessment, delinquent interest[3] on the erroneous assessment, redemption interest on the erroneous assessment, and the costs of the sale. Delinquent interest is interest that accrues when the taxpayer fails to pay property taxes by the statutory due date. § 39-10-104.5, 11 C.R.S. (1997).

One of the taxpayers, Havana Street, Ltd., filed a protest upon receiving the notice of valuation from the assessor. The other taxpayers waited until after the tax lien sale and then petitioned for abatement and refund. The protest and the petitions for abatement were denied by the assessor and the assessor's denial was affirmed on appeal to the Arapahoe County Board of Equalization (BOE). Further appeal to the State Board of Assessment Appeals (BAA) resulted in a substantial lowering of the assessed values of all the taxpayers' properties and an order to the treasurer to abate the taxes.

The county refunded the erroneously levied taxes, but refused to pay any refund interest for having held the

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[3] Delinquent interest is also known as "penalty interest." We use the term "delinquent interest" because of the legislature's preference for this phrase. See ch. 320, sec. 1-25, §§ 39-1-107 to 39-12-103, 1992 Colo. Sess. Laws 2222, 2222-34 (replacing the term "penalty interest" with the term "delinquent interest" throughout Title 39).

taxpayers' money in error. Refund interest is interest paid to the taxpayer on the amount of the refunded payment. § 39-10-114(1)(b), 11 C.R.S. (1997). In addition, the county refused to return to the [p. 6] taxpayers the delinquent interest and the redemption interest that the taxpayers paid on the portion of the tax assessment determined to be excessive. The taxpayers sued the county and the treasurer, arguing that the county's refusal to pay these amounts constituted a violation of the statutory scheme, an unconstitutional taking, and unjust enrichment.

The taxpayers moved for summary judgment, and the county and the treasurer responded by moving to dismiss for failure to state a claim upon which relief can be granted. After a hearing, the district court issued a declaratory judgment that the taxpayers were not statutorily entitled to refund interest, nor were they entitled to a reimbursement of the delinquent interest and the redemption interest paid on the abated portion of the taxes. The district court held that the statutory scheme was neither unconstitutional nor inequitable, and that the taxpayers failed to present any evidence in support of their claims. The district court dismissed the taxpayers' claims for failure to state a claim.

The taxpayers appealed. The court of appeals agreed with the taxpayers that the county was required to pay refund interest[4] and to reimburse the taxpayers for

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[4] The court of appeals held that refund interest must be calculated from the date that the taxes became delinquent to the date of the tax sale because delinquent interest ceases to accrue upon the sale of the tax lien. The court rejected the taxpayers' argument that refund interest should be calculated from the date that the taxes became delinquent to the date of redemption.

delinquent interest paid on the abated portion of the taxes. *See Dove Valley*, 923 P.2d at 245, 248. However, the court of appeals agreed with the district court that the county was not required by statute to reimburse

* * *

[p. 9] C.R.S. (1997), by the BAA, *see* § 39-8-108, 11 C.R.S. (1997), and by state appellate courts, *see id.* If the taxpayer prevails, the treasurer reduces the tax to reflect the proper assessment.

Although statutory deadlines ensure that this procedure occurs as expediently as possible, the legislative scheme contemplates that in some cases the tax will become due before the resolution of the protest. *See* § 39-8-109, 11 C.R.S. (1997); *Gates Rubber Co. v. State Bd. of Equalization*, 770 P.2d 1189, 1193 (Colo. 1989); *Board of Assessment Appeals v. Benbrook*, 735 P.2d 860, 865 (Colo. 1987). Should taxes become due before the completion of the protest procedure, the taxpayer must pay the amount of the assessment, and if the protest is successful, the treasurer refunds the overpayment of taxes and any delinquent interest paid on the amount of the overassessment, together with refund interest at one percent per month. *See* § 39-8-109 (stating that the taxpayer will receive a refund if a protest is successful); § 39-10-114(1)(a)(I)(A), 11 C.R.S. (1997) (providing for a refund of taxes levied erroneously or illegally and delinquent~~penalty~~ interest thereon); *Gates Rubber Co.*, 770 P.2d at 1193; *Benbrook*, 735 P.2d at 865.

Protest is not the only remedy available to a property owner whose property is overvalued by the assessor. The property owner may elect to pay the taxes by the due date and then petition the board of county commissioners

for an abatement and refund. *See* § 39-1-113, 11 C.R.S. (1997). The board of county [p. 10] commissioners conducts a hearing on the petition and makes a recommendation to the state tax administrator, whose decision may be appealed by the taxpayer to the BAA. *See* § 39-2-125(1)(b), 11 (1997). The taxpayer, if successful, receives a refund of the overpayment of taxes and any delinquent~~penalty~~ interest paid on the amount of the overassessment, together with refund interest at one percent per month. *See* C.R.S. § 39-8-109 (1997).

Neither the protest procedure nor the abatement procedure suspends the deadline for the payment of property taxes. Taxpayers must pay their property taxes by the due date regardless of the fact that a protest may be pending or that the taxpayer may intend to file a petition for abatement. *See* § 39-10-104.5(3)(b), 11 C.R.S. (1997). Failure to pay taxes in a timely manner results in the accrual of delinquent interest in the amount of one percent per month. *See id.* In addition, a tax lien attaches against the property for the amount of taxes levied against the property together with any delinquent interest, costs, and fees. *See* § 39-1-107, 11 C.R.S. (1997).

The county treasurer is required to hold a public auction for the purpose of selling these tax liens to third party investors. *See* § 39-11-101, 11B C.R.S. (1997). To purchase a tax lien, the investor must pay the taxes levied against the property, the accrued delinquent interest, and the costs of the sale. *See* § 39-11-115, 11 C.R.S. (1997). In exchange, the purchaser acquires a certificate of purchase which operates as a [p. 11] lien against the property. Three years from the date of the tax lien sale, the tax certificate holder, upon paying all subsequent taxes due

on the property, is entitled to receive a deed to the property from the treasurer. *See* § 39-11-120, 11 C.R.S. (1997).

If a property generates no bids at the tax lien sale, then the treasurer must strike off the tax liens on those properties for the amount of taxes, delinquent interest, and costs, and remove this property from the county tax rolls. *See* § 39-11-108, 11 C.R.S. (1997). The treasurer issues a certificate of purchase to the county, *see id.*, which becomes the owner of the lien. Although the county is not required to undergo "the useless form of paying the price with one hand and receiving it with the other," the legal effect of the treasurer striking off land to the county is that of a sale. *See* 72 Am. Jur. 2d *State and Local Taxation* § 956 (1974). The county is considered a "purchaser" who has paid the taxes levied against the property, the accrued delinquent~~penalty~~ interest, and the costs of the sale. *See* § 39-11-142, 11 C.R.S. (1997); *Tarabino Real Estate Co. v. Dunlavy*, 105 Colo. 523, 525-26, 99 P.2d 926, 927-28 (1940). Subsequent taxes levied against parcels held by the county in this manner do not become payable unless the county sells the tax lien or the property is redeemed by the owner. *See* § 39-11-108. Like any other purchaser, the board of county commissioners may apply for and receive a deed to the property three years after the sale. *See* § 39-11-142.

[p. 12] Any time before the tax lien sale the taxpayer may recover his property by paying the amount of tax assessed together with delinquent~~penalty~~ interest. After the tax lien sale, the taxpayer may redeem by paying the amount of taxes, delinquent interest, and costs paid by

the purchaser of the tax lien with redemption interest[1] on this amount. If the certificate holder paid taxes on the property after the sale, then the taxpayer also must pay the taxes paid plus redemption interest in order to redeem. *See* § 39-12-103(3), 11 C.R.S. (1997). All monies received by the treasurer for the redemption of land is delivered to the holder of the tax lien certificate. *See* § 39-12-108, 11 C.R.S. (1997). It is the duty of the treasurer to exact payment from the taxpayer for the purchaser's entire purchase money, plus statutory interest, charges, and penalties, and to deliver this money to the purchaser. *See id.; see also* § 39-12-103(3), 11 C.R.S. (1997); § 39-11-130, 11 C.R.S. (1997); *Statton v. People ex rel. Burr,* 18 Colo. App. 85, 91-92, 70 P. 157, 159 (1902). After the treasurer issues a deed to the purchaser, the taxpayer no longer has a property interest in the real estate and may no longer redeem.

The purpose underlying this scheme is to ensure that the county has a consistent source of revenue. *See Liebhardt v. Department of Revenue,* 123 Colo. 369, 374, 229 P.2d 655, 658

* * *

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[1] Redemption interest is nine percentage points above the discount rate, which in this case was approximately 15-16%. *See* § 39-12-103(3).

39-12-103. Redemption made – interest. (1) Real property for which a tax lien was sold under the provisions of article 11 of this title as a result of delinquent taxes may be redeemed by the owner thereof or his agent, assignee, or attorney, or by any person having a legal or equitable claim therein, or by a holder of a tax sale certificate;

* * *

(3) The redemption may be made at any time before the execution of a treasurer's deed to the purchaser or his heirs or assigns upon payment to the treasurer, to be held by him subject to the order of the purchaser, of the amount of taxes, delinquent interest, and costs for which the tax lien on the property was sold, with redemption interest thereon from the date of sale at the rate which is determined as provided in this subsection (3), together with the amount of all taxes accruing on such real property after the sale, paid by the purchaser and endorsed on his certificate of purchase, with redemption interest at the rate which is determined as provided in this subsection (3) on such taxes so endorsed on the certificate of purchase. Any payment under this section shall be deemed received by the treasurer on the date that it is actually received in the treasurer's office. The annual rate of redemption interest shall be nine percentage points above the discount rate, which discount rate shall be the rate of interest a commercial bank pays to the federal reserve bank of Kansas City using a government bond or other eligible paper as security, and shall be rounded to the nearest full percent.

* * *

39-10-114. Abatement, cancellation of taxes. (1)(a)(I)(A) Except as otherwise provided in sub-subparagraphs (D) and (E) of this subparagraph (I), if taxes have been levied erroneously or illegally, whether due to erroneous valuation for assessment, irregularity in levying, clerical error, or overvaluation, the treasurer shall report the amount thereof to the board of county commissioners, which shall proceed to abate such taxes in the manner provided by law. If such taxes have been collected by the treasurer, the board of county commissioners shall authorize refund of the same in the manner provided by law. Except as provided in sub-subparagraph (E) of this subparagraph (I), in no case shall an abatement or refund of taxes be made unless a petition for abatement or refund is filed within two years after January 1 of the year following the year in which the taxes were levied.

* * *

(B) . . . Where a final determination is made granting an abatement or refund pursuant to the provisions of this section, the abatement or refund granted shall be payable at such time as determined by the board of county commissioners after consultation with affected taxing entities but no later than upon the payment of property taxes for the property tax year in which said final determination was made.

* * *

(b) Any taxes illegally or erroneously levied and collected, and delinquent interest thereon, shall be refunded pursuant to this section, together with refund interest at the same rate as that provided for delinquent

interest set forth in section 39-10-104.5. Said refund interest shall accrue only from the date payment of taxes and delinquent interest thereon was received by the treasurer.

39-5-122. Taxpayer's remedies to correct errors. (1) On or before May 1 of each year, the assessor shall give public notice in at least one issue of a newspaper published in his county that, beginning on the first working day after notices of adjusted valuation are mailed to taxpayers and until June 1, he will sit to hear all objections and protests concerning valuations of taxable real property determined by him for the current year; that, for a taxpayer's objection and protest to be heard, notice must be given to the assessor; and that such notice, if given by mail, must be by May 27 or, if given in person, must be by June 1.

* * *

(2) If any person is of the opinion that his property has been valued too high, or has been twice valued, or is exempt by law from taxation or that property has been erroneously assessed to him, he may appear before the assessor and object, he may complete the form mailed with his notice of valuation pursuant to section 39-5-121 (1) or (1.5), or he may file a written letter of objection and protest by mail with the assessor's office before the last day specified in the notice, stating in general terms the reason for the objection and protest. . . . The protester shall have the opportunity on the days specified in the public notice to present his objection by mail or protest in

person and be heard, whether or not there has been a change in valuation of such property from the previous year and whether or not any change is the result of a determination by the assessor for the current year or by the state board of equalization for the previous year.

* * *

(b) Any information presented by the taxpayer regarding the value of his property shall be considered by the assessor in determining whether an adjustment in value is warranted.

39-8-109. Effects of board of assessment appeals or district court decision. If upon appeal the appellant is sustained, in whole or in part, then, upon presentation to the treasurer of a certified copy of the order or judgment of the board of assessment appeals or district court, as the case may be, modifying the valuation for assessment of his property, he shall forthwith receive the appropriate refund of taxes and delinquent interest thereon, together with refund interest at the same rate as delinquent interest as specified in section 39-10-104.5(4) and (6), . . . Such refund interest shall only accrue from the date on which payment of taxes and delinquent interest thereon was received by the treasurer.

* * *

No. 97-1183

Supreme Court, U.S.
FILED
FEB 17 1998
CLERK

In The

Supreme Court of the United States

October Term, 1997

DOVE VALLEY BUSINESS PARK ASSOCIATES, LTD., a Colorado Ltd. Partnership; HAVANA STREET, LTD., a Colorado limited partnership and GULLWING ACRES LIMITED LIABILITY CO., a Wyoming limited liability company; and COLORADO NATIONAL BANK, a federally chartered bank, as successor by merger to BANK WESTERN, a federal savings bank,

Petitioners,

v.

THE BOARD OF COUNTY COMMISSIONERS OF ARAPAHOE COUNTY, COLORADO; and ADRIAN B. "BERNIE" CIAZZA, TREASURER, ARAPAHOE COUNTY, COLORADO,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of The State Of Colorado

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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PARTIES TO THE PROCEEDING

The petition accurately lists the parties to the proceeding.

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STATEMENT OF THE CASE

This case commenced as an administrative appeal by the property owners (taxpayers) of Arapahoe County's valuation for purposes of ad valorem taxation of real property. The case now comes before this Court on the narrow issue of whether county treasurers in the State of Colorado, as required by Colorado law, shall retain, for ultimate payment to holders of certificates of purchase of tax liens, "redemption interest"[1] collected on a portion of the taxpayers' real property taxes. The redemption interest at issue is that interest charged for the portion of the underlying valuation which was eventually determined to be incorrect.

Taxpayers petitioned, for and the Colorado Supreme Court granted, certiorari review of the decision of the Colorado Court of Appeals.[2]

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[1] "Redemption interest," is required under Colorado law pursuant to § 39-12-103, 11 C.R.S. (1997).

[2] "The issues were framed on certiorari as follows:

> Did the Court of Appeals err in determining that the County's assessment against the taxpayer of redemption interest on erroneously assessed taxes is a constitutionally permissible taking of petitioners' property?
>
> Did the Court of Appeals err in determining that petitioners' equitable claim of unjust enrichment must fail because the county assertedly did not receive a benefit from the taxpayer, did not encourage or initiate the transaction which it benefited from, and is not typically the principal beneficiary of redemption interest?" *See Dove Valley Bus. Park Assocs. v. Board of County Comm'rs of Arapahoe County*, 945 P.2d 395, at footnote 1 (Colo. 1997).

The key to understanding the issues decided by the Colorado Supreme Court is an understanding of the concept of, and the necessity for, "redemption interest." In the case for which review is sought, the State Supreme Court first gives a detailed explanation and analysis of the Colorado laws pertaining to the valuation of property for the purpose of ad valorem taxation, and those laws setting forth the statutory scheme for collection of general property taxes. *See App 7 to App 11, Petition For Writ of Certiorari.*

The Colorado high court goes on to explain the purpose and necessity for "redemption interest." As the Court stated, " the purpose underlying this scheme is to ensure that the county has a consistent source of revenue." *See App 11 to Petition for Writ of Certiorari. See also Liebhardt v. Department of Revenue,* 123 Colo. 369, 374, 229 P.2d 655, 658 (1951)

The Colorado Supreme Court rejected Petitioners' arguments that there was a taking in violation of the Fifth and Fourteenth Amendments to the United States Constitution or the principles set forth by the United States Supreme Court in *Webb's Fabulous Pharmacies, Inc. v. Beckwith,* 449 U.S. 155, 101 S.Ct. 446, 66 L.Ed.2d 358 (1980), and *Harper v. Virginia Dept. of Taxation,* 113 S. Ct. 2510, 125 L.Ed.2d 74 (1993).

Petitioners' now raise essentially the same issues and make the same arguments to this Court that they raised and made to the Colorado Supreme Court, and which were rejected by the Colorado Supreme Court.

REASONS FOR DENYING THE WRIT

I. The Petition fails to meet the considerations governing review on certiorari set forth in the Court's Rule 10.

Looking initially at the Court's considerations governing review on certiorari (Rule 10), while recognizing that said considerations are neither controlling nor fully measuring of the Court's discretion, the subject Petition for Writ of Certiorari ("Petition") does not adequately raise any of the considerations the Court usually uses to review such Petitions.

The Petition is not based on a decision entered by a United States Court of Appeals. Further, though the Petition claims that a state court of last resort, i.e., the Supreme Court of Alaska, in *Cool Homes, Inc. v. Fairbanks*, 860 P.2d 1248 (Alaska 1993), has decided an important federal question in a way that conflicts with the decision of another state court of last resort, i.e., the Supreme Court of Colorado in the subject appeal, *Dove Valley Bus. Park Assocs. v. Board of County Comm'rs of Arapahoe County*, 945 P.2d 395 (Colo. 1997), a careful reading of *Cool Homes* distinguishes *Cool Homes* from *Dove Valley*, and thus fails to support Petitioners' contention of a conflict between state courts of last resort.

Additionally, the Supreme Court of Colorado has not decided an important question of federal law in a way that conflicts with relevant decisions of the Supreme Court of the United States. There are no compelling reasons for this Court to grant the Petition herein.

II. The decision of the Supreme Court of Colorado on the federal issues raised in the subject case is not in conflict with established precedent of the Supreme Court of the United States.

The cases cited by Petitioners in support of their claim that the Colorado Supreme Court's decision conflicts with established but older precedent of the United States Supreme Court are over a century old, arise from a totally different fact pattern, and are not directly on point. The cases, i.e., *County of San Bernardino v. Southern Pac. R. Co.*, 118 U.S. 417, 6 S.Ct. 1144, 30 L.Ed. 125 (1886) and *County of Santa Clara v. Southern Pac. R. Co.*, 118 U.S. 39, 6 S.Ct. 1132, 30 L.Ed. 118 (1886), did not involve "redemption interest" payable to third parties as an inducement to pay or "loan" the taxes necessary for the efficient and continuous operation of local government. In short these two old "railroad" cases turned on the simple fact that the subject California counties could not collect any taxes on certain of the railroad's property. The cases involved property that in effect was "exempt" and not a situation of taxable property that was later determined to have been incorrectly valued.

III. The decision of the Supreme Court of Colorado found and held that the collection of redemption interest on an erroneous assessment does not amount to an unconstitutional taking.

Contrary to the contention of the Petitioners, the decision of the Supreme Court of Colorado did not sustain the validity of a state statutory taxing scheme which violates the Due Process Clause and the Taking Clause of the Fifth and Fourteenth Amendments to the United

States Constitution. The Colorado Supreme Court did acknowledge Petitioners' argument that the statutory scheme, including the disposition of redemption interest, will sometimes produce a harsh result. That Court went on to explain that this is so because tension exists between the government's need to generate revenue and the property owner's rights in connection with his property. Further, with respect to provisions for redemption, the Colorado legislature resolved these conflicting interests in favor of the County. Absent constitutional infringement, it is not our province to rewrite the statutes. *See Nelson v. City of New York*, 352 U.S. 103, 111 (1956) (stating that "relief from the hardship imposed by a state statute is the responsibility of the state legislature and not of the courts"). *See App 17 and 18, Petition For Writ of Certiorari.*

As this Court stated in *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 163 (1980):

> This Court has been permissive in upholding governmental action that may deny the property owner of some beneficial use of his property or that may restrict the owner's full exploitation of the property, if such public action is justified as promoting the general welfare. *See, e.g. Andrus v. Allard*, 444 U.S., at 64-68, 100 S.Ct., at 326-328; *Penn Central Transportation Co. v. New York City*, 438 U.S., at 125-129, 98 S.Ct., at 2660-2662.

In Colorado, delinquent taxpayers have no constitutional right to redemption. Instead, redemption is a statutory privilege created by the state legislature that may be exercised only as provided by statute. Redemption is "a gratuity which, if granted, may be restricted" as the

legislature deems appropriate. If the County cannot compel the taxpayer to pay property taxes on a parcel, then the County must find someone who will or else strike the property from the County tax rolls and suffer a loss of revenue. In most counties, the principal source of revenue is from property taxes. Should the property go to tax sale, it is imperative that the county finds an investor to purchase the lien.

Redemption interest furthers the goal of providing a consistent source of income by discouraging taxpayers from allowing their properties to go to a tax lien sale, and by encouraging third-party bidding as purchasers of the tax liens. *See App 11 to App 13, Petition For Writ of Certiorari.*

CONCLUSION

For the reasons given above, the Petition should be denied.

Dated: February 16, 1998

Respectfully submitted,

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